was found guilty and was sentenced to 6 months' imprisonment.

Held, dismissing the appeal: (1) in this case there was sufficient "use" of the forged document as genuine;

(2) the duty of a court hearing an appeal from the decision of a lower court is to make up its own mind, not disregarding the judgment appealed from and giving special weight to that judgment in cases where the credibility of the witnesses come in question but with full liberty to draw its own inference from the facts proved and to decide accordingly;

(3) on the facts, any court acting reasonably would have come to the inescapable conclusion that at the time the identity card was alleged to be used, the appellant knew that it was a forgery.

CRIMINAL APPEARL.

T. Ariarajah for the appellant.

Ajaib Singh (Senior Federal Counsel) for the respondent.

Raja Azlan Shah J.: The charge against the appellant was that he dishonestly used as genuine a Singapore identity card in order to exchange it for a Federation identity card and that he knew or had reason to believe it to be forged.

The learned magistrate convicted him under section 471 of the Penal Code read with section 465 of the Penal Code and sentenced him to 6 months' imprisonment.

The facts of the case may now briefly be stated. The appellant claimed to be the holder of a Singapore identity card No. S.M. 08722. He applied to the registration officer Petaling Jaya for an exchange of his Singapore identity card. He was interviewed and he presented his Singapore identity card to the registration officer as evidence. The Singapore identity card was later verified from the Singapore registration office to be a forgery. The real Singapore identity card bearing that number was issued to a Chinese lady who gave evidence for the prosecution. There was therefore in this case sufficient "use" of a forged document as genuine. On these facts, the appellant was charged and convicted as stated earlier.

The defence was that the identity card was not forged; that his uncle, since deceased, had obtained it for him at the Singapore National Registration Office, that he never doubted its genuiness nor could he believe it to be forged. He therefore pleaded that he never knew, nor had reason to believe that the identity card was a forged document. He called no witness.

The first contention on behalf of the appellant was that his identity card is not forged, but I have no doubt that it is forged. The identity card told a lie about itself. The learned magistrate has given good and cogent reasons for his conclusion on the point and in my view, they correctly answer all the criticisms of the appellant.

It is next contended that the circumstances established in the case do not establish that the appellant knew or had reason to believe that the identity card which he was dishonestly using was forged. The mere fact that the identity card was forged would not conclude the matter unless it was also established that the appellant knew or had reason to believe that at the time it was alleged to be used it was a forgery. The learned magistrate found as a fact that at the time when the impugned identity card was obtained by his uncle he knew it was a forged document and that he retained that knowledge when he made the present application. Putting it in a compendious form, the learned magistrate was satisfied that at the time when the appellant "used" the forged document he knew that it was forged. I agree with his conclusion but not with his reasoning. The duty of a court hearing an appeal from the decision of a lower court is to make up its own mind, not disregarding the judgment appealed from and giving special weight to that judgment in cases where the credibility of the witnesses come in question but with full liberty to draw its own inference from the facts proved and to decide accordingly.

In the present case there is no question of the credibility of witnesses. The material facts so far as they are known, are not disputed; and this court is at liberty, and indeed, is bound to draw its own inference from them. It is sufficient to say that once one looks at the issues before the court, which one can gather from the facts which have already been stated, it is only too plain to conclude that there was no such uncle as the appellant had suggested and that there would therefore be no such person who had obtained the identity card for him; then taking the evidence as a whole, including that for the prosecution, any court acting reasonably would have come to the inescapable conclusion that at the time the identity card was alleged to be used the appellant knew that it was a forgery.

Appeal against conviction dismissed.

Appeal dismissed.

Solicitors: *T. Ariarajah & Co.*

OTHMAN BIN AHMAD v. PUBLIC PROSECUTOR

[F.C. (Azmi L.P., Gill and Ali F.JJ.) July 22, 1970]

[Kota Bharu — Federal Court Criminal Appeal No. 12 of 1970]

Criminal Law and Procedure — Trial — Murder — Summing up to jury — Burden on accused — Alleged omission to put defence to jury.

Criminal Law and Procedure — Murder — Trial of — Defences of provocation and self-defence — Alleged misdirection to jury on law of burden of proof.

Penal Code, s. 300, Exceptions.

Evidence Ordinance, 1950, s. 105 — Burden of proof — Direction to jury as to.

This was an appeal against the conviction of the appellant for murder. On appeal it was argued (a) that the learned trial judge had misdirected the jury as to the law in holding that the accused had a burden of proof to discharge by directing that "the burden of proving or satisfying you that the accused person only struck in self-defence is not as heavy as the prosecution burden of proving overall that the accused committed the offence of murder"; (b) that the learned trial judge failed to direct the jury to consider the possible verdict of culpable homicide not amounting to murder on the ground that the accused committed that act whilst deprived of the power of self-control by grave and sudden provocation. At the hearing of the appeal an additional ground was raised

that the learned judge had failed to direct the jury on the question of sudden fight.

Held, dismissing the appeal: (1) in this case although it would have been preferable if the word "burden" had been used so as to make it clear that such a burden on the accused is sufficiently discharged if the jury are left with a sense of reasonable doubt as to the existence or non-existence of the circumstances supporting the particular defence, yet it was clear that from the summing up as a whole in this case a reasonable jury could not have failed to appreciate that there was a substantial difference between the burden on the accused and the burden required of the prosecution;

(2) in this case there was no evidence as would require the learned trial judge to direct the jury on the question of provocation or sudden fight.

Cases referred to:-

(1) *Abdullah* v. *Public Prosecutor* [1967] 2 M.L.J. 95.

(2) *Looi Wooi Saik* v. *Public Prosecutor* [1962] M.L.J. 337.

(3) *Haji Talib* v. *Public Prosecutor* [1969] 1 M.L.J. 94.

(4) *R.* v. *Hopper* [1915] 2 K.B. 431, 435.

FEDERAL COURT.

R. C. Murugeson for the appellant.

Ajaib Singh (Senior Federal Counsel) for the respondent.

Azmi L.P. (delivering the judgment of the court): The appellant was convicted of murder and sentenced to death. He was charged with intentionally causing the death of one Darus bin Idris in September 1969, at Kampong Sungei Korok, Kubang Sepat, Mukim Jerlon, in the District of Kubang Pasu, Kedah and was found guilty by a unanimous verdict of the jury. His main defence at the trial was self-defence.

In this appeal he complained against his conviction on the following grounds: —

(1) that the learned trial judge misdirected the jury as to the law in holding that the accused had a burden of proof to discharge by directing that "the burden of proving or satisfying you that the accused person only struck in self-defence is not as heavy as the prosecution burden of proving overall that the accused committed the offence of murder";

(2) that the learned trial judge failed to direct the jury to consider the possible verdict of culpable homicide not amounting to murder on the ground that your petitioner committed the act whilst deprived of the power of self-control by grave and sudden provocation.

Two other grounds Nos: (3) and (4) were respectively concerned with the trial judge's summing-up of certain evidence in the case and with the jury's finding on the facts. We are satisfied that the appeal, so far as it is based on these two other grounds, is without substance. That leaves us with grounds (1) and (2) as stated.

As to (1), our attention was drawn to the use of the expression "burden of proof" or "satisfying" in one passage of the summing-up of the learned trial judge when directing the jury on the law relating to self-defence and to the use of the expression "satisfied" in another passage when speaking of the burden which lies on the prosecution to prove the guilt of an accused person.

The first passage reads: —

"The burden of proving or satisfying you that the accused person struck only in self-defence is not as heavy as the prosecution burden of proving overall that the accused committed the offence of murder."

The second passage reads: —

"Secondly, if you are satisfied considering the case as a whole that the accused killed the deceased in the manner stated by Hassan, then your verdict will be Guilty — that is *Guilty of Murder.*"

It was submitted that the use of the expression "satisfying" in the first passage and the expression "satisfied" in the second passage would tend to suggest to the jury that the degree of proving self-defence required of the defence was no less than that required of the prosecution in proving the guilt of an accused person. That may be so. But the summing-up has to be read as a whole. So read and in view of the words "not as heavy" which appear in the first passage and in view of the following passage —

"If you are left with a sense of reasonable doubt as to whether the accused was acting in self defence or not when he caused the fatal injuries upon the deceased — and when I say 'reasonable doubt' I do not mean any vague doubt but real doubt, then your verdict will be *Not Guilty.*"

We think a reasonable jury could not have failed to appreciate that there was some substantial difference. Above all the unanimous verdict of the jury in this case clearly shows that the defence evidence of self-defence was totally rejected. In this connection this court has said in *Abdullah* v. *Public Prosecutor*[1] —

"In our view, it is a misdirection in law to say that the burden is on the appellant to bring himself within the exceptions."

That statement of the law was inspired by what was said by Thomson C.J. (as he then was) in *Looi Wooi Saik* v. *Public Prosecutor*[2] when explaining the effect of section 105 of the Evidence Ordinance in which the expression "burden of proving" is used. In particular the learned Chief Justice has laid down a rule for guidance as to the manner in which a jury is to be directed when the defence of provocation is raised. The same rule of guidance necessarily applies when defence of self-defence is raised. Although it is apparent from the summing-up of the learned trial judge in the instant case that he was familiar with this rule of guidance when he used the words "If you are left with a sense of reasonable doubt", it would have been preferable if the word "burden" has been used in the way it was used by Thomson C.J. in *Looi Wooi Saik's* case, *supra.* In that case the learned Chief Justice advised at page 340 in these terms:

"In the circumstances it is our view that the proper direction to a jury is that if the defence of provocation is to succeed there must be something to support it, either something in the prosecution evidence or some evidence given by the defence which is capable of making it out. But if there is anything to support it then the *burden* which in the first place lies upon the defence of making it out is sufficiently discharged if the jury are left with a sense of reasonable doubt as to the existence or non-existence of the provocation."

We now turn to ground (2) which is concerned with non-direction on the question of provocation. The law on this point is the same here as in England. It was applied by Ong Hock Thye F.J. (as he then was) in *Haji Talib* v. *Public Prosecutor*[3] when delivering the judgment of this court. His Lordship said at page 94 —

"... we feel that perhaps in this case there was in effect a *lacuna* in the omission to put the specific defence of sudden fight to the jury, even though it had not been raised by defending counsel."

This duty of putting a specific defence to the jury even though it is not raised by defence counsel has been clearly expressed by Lord Reading C.J. when delivering the judgment of the English Court of Criminal Appeal in the case of *Rex* v. *Hopper*.[4] The learned Chief Justice at page 435 said —

"We do not assent to the suggestion that as the defence throughout the trial was accident, the judge was justified in not putting the question as to manslaughter. Whatever the line of defence adopted by counsel at the trial of a prisoner, we are of opinion that it is for the judge to put such questions as appear to him properly to arise upon the evidence even though counsel may not have raised some question himself. In this case it may be that the difficulty of presenting the alternative defences of accident and manslaughter may have actuated counsel in saying very little about manslaughter, but if we come to the conclusion, as we do, that there was some evidence — we say no more than that — upon which a question ought to have been left to the jury as to the crime being manslaughter only, we think that this verdict of murder cannot stand."

In the instant case it is true that the learned trial judge did not direct the jury on the question of provocation. He did not do so probably because he thought there was no evidence at all on which the jury could find that the act was committed by the appellant whilst deprived of the power of self-control by grave and sudden provocation as would bring the case within *Exception* 1 of section 300 of the Penal Code. The law as stated by Lord Reading in *Rex* v. *Hopper, supra,* envisages the existence of some evidence on which specific defence can be founded. We have examined this case and found there was not a scrap of evidence as would require the learned trial judge to direct the jury on the question of provocation. If at all it was only the evidence of the appellant himself which had to be considered. Nowhere else could there be found anything to suggest provocation. The unanimous verdict of the jury leaves us in no doubt that the appellant's evidence had been rejected as untrue. For this reason the appeal on this ground (2) also fails.

An additional ground was raised at the hearing of this appeal which was not objected to by the learned Deputy Public Prosecutor for the respondent. According to the appellant the evidence of P.W. 4 Baharom bin Idris was sufficient to require the learned trial judge to direct the jury on the question of sudden fight within the meaning of *Exception* 4 of section 300 of the Penal Code which reads as follows: —

"*Exception* 4. — Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel, and without the offender having taken undue advantage or acted in a cruel or unusual manner.

Explanation — It is immaterial in such cases which party offers the provocation or commits the first assault."

For the purpose of this ground our attention was particularly drawn to the following evidence of the witness: —

"About 9.30 a.m. I saw three persons running around — in a *bendang* plot — running around within a small radius. I went towards this spot because I thought that they were fighting. At first I could not recognize the three. After running three *relongs* I stopped to recover my breath. I then saw accused running. He was one of the three I first noticed in the plot. He was running on a *batas* and carried what I thought was a *tajak* similar to Exhibit P. 2. I also saw deceased lying beside the *batas* and P.W. 2 was beside the deceased."*

Later in answer to questions by the court, the same witness said —

"All three were running to and fro within a small area. Whilst I ran the first 2 *relongs* towards them they were still running about. Apart from running I did not see them doing anything else. I did not hear if any of the three shouted. I did not see the three grappling with one another.... I merely thought they were fighting when I saw the three running about."

It is apparent therefore from the above evidence that the witness did not say he saw a fight. He assumed from what he saw that there was a fight. Hassan, the deceased's son, who was also near by said nothing about a fight.

We cannot therefore agree that on the above evidence the learned judge should have put to the jury the question of a sudden fight. It is true that in the case of *Haji Talib* v. *Public Prosecutor, supra,* this court had on the facts of that case taken the view that there was a duty to direct the jury on the question of sudden fight although the defending counsel had not raised it. That view was fortified by the fact that the conviction for murder was based on a majority verdict of 5 to 2. We are unable to take the same view here, not only because the verdict of the jury was unanimous, but also because in our view, there is no evidence available for the jury to consider the question of sudden fight.

We can further say in reference to this new ground as we had said in reference to the ground of provocation, that if there was evidence at all, it was the evidence of the appellant himself which could suggest a defence of sudden fight and we can say here again that the unanimous verdict of the jury leave us in no doubt that the appellant's evidence had been rejected as untrue by the jury, and the failure by the learned judge in not putting the question as to sudden fight could not have occasioned a failure of justice.

For the above reasons we dismiss the appeal.

Appeal dismissed.

* ["*bendang*" — wet rice field; "*batas*" — bund or banks round wet rice plots; "*tajak*" — the rice planter's weed cutter; "*relong*" — about 200 feet.]